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No. ~~97-56~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICES, INC., et al.,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. TITLE VII APPLIES TO SAME-SEX DISPARATE TREATMENT

Respondents acknowledge that the Title VII prohibition against gender based discrimination protects men as well as women. (R.Br. 12). Respondents also agree that ordinarily the Title VII prohibition against gender-based discrimination will apply even where the employee who took the allegedly gender-based action was of the same sex as the asserted victim. "Title VII supports a cause of action for discriminatory decisionmaking in employment regardless [of] whether the decisionmaker is the same gender as the claimant." (R. Br. 11-12). The central contention advanced by respondents is that harassment[1], or at least sexual harassment, is somehow different from other forms of discrimination.

Respondents evidently do not deny that if a male supervisor denied a promotion to, demoted, fired, or reduced the pay of a male subordinate, because of that subordinate's

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[1] The gender-related harassment cases in the lower courts fall into four distinct categories: (1) facially neutral harassment targeted at a victim on account of his or her gender (e.g hitting an employee; haranguing an employee as incompetent), (2) facially gender-based but non-sexual harassment (e.g. denigrating women as incompetent; use of gender-specific epithets), (3) facially sexual harassment (e.g. unwelcome sexual advances), and (4) quid pro quo sexual demands. The appropriate method of analysis and proof may vary to some degree depending on the type of harassment involved.

gender, those facts would state a claim under Title VII[2]. Indeed, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), no member of the Court thought it was an obstacle to Paul Johnson's Title VII claim that the supervisor who had made the disputed promotion decision, James Graebner, was a man.[3] If an employer made a "discriminatory decisio[n]" to give women or men preferential treatment in their choice of shift, vacation days, or offices, that distinction would fall within the statutory prohibition; respondents do not suggest that it would matter in such a case whether the supervisor or manager who adopted the policy was a man or a woman. But, according to respondents, the same male supervisor who could not, on account of gender, dismiss or demote a male worker, could legally harass that same worker in a facially neutral or even facially discriminatory manner.

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[2] In some narrow circumstances Title VII permits an employer to consider the gender of an employee or applicant in making an employment decision. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(affirmative action); *Dothard v. Rawlinson*, 433 U.S. 321 (1977)(bona fide occupational qualification); *see Wittmer v. Peters*, 87 F. 3d 916 (7th Cir. 1996), *cert. denied* 117 S.Ct. 949 (1997)(race may be considered among other relevant circumstances where it is indisputably relevant to applicant's ability to perform job duties).

[3] The lower courts have repeatedly upheld Title VII claims where the plaintiff and the official responsible for the disputed decision were of the same gender. *Eg. Wilson v. Bailey*, 934 F. 2d 301 (11th Cir. 1991); *Veatch v. Northwestern Memorial Hospital*, 730 F. Supp. 809 (N.D.Ill. 1990); *see Blalock v. Metals Trades, Inc.*, 775 F. 2d 703, 708 (6th Cir. 1985)(alleged discrimination against a Christian by another Christian); *Hansborough v. City of Elkhart Parks and Recreation Dep't*, 802 F.Supp. 199, 201, 206 (N.D.Ind. 1992)(alleged discrimination against black individual by another black individual).

Nothing in the language of Title VII, and nothing in this Court's equality jurisprudence, supports such a distinction. Section 703(a) provides in part, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* . . . sex". (Emphasis added). Being subjected to harassment is an undesirable "condition of employment", like working in the dirty part of a factory or being required to handle dangerous chemicals. The plain language of the statute refers only to the sex of the *victim* of the alleged unlawful act; the statute makes no mention whatever of the sex of the individual who perpetrated that act.[4] Equally importantly, section 703(a) on its face makes no distinction between harassment and any other form of discrimination.

Many types of harassment are indistinguishable in their intent and selectivity from a discriminatory decision to fire a woman because of her gender; respondents offer no explanation as to why, where the perpetrator and victim are of the same gender, one such decision would violate Title VII, while the other gender-based decision would be entirely legal. It is unclear whether respondents claim that an employer would be immune from suit under Title VII if the employer orchestrated a campaign of harassment against women workers, or chose to protect only men, but not women, from harassment, so long as the company official who adopted that discriminatory policy were a woman. Respondents apparently

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[4] *Doe v. City of Belleville, Illinois*, 119 F. 3d 563, 569 ("Title VII on its face draws no distinction between men and women, either as plaintiffs or harassers"), 572 ("The language of Title VII . . . does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed")(7th Cir. 1997).

do contend that Sundowner could legally adopt a formal written rule such as "It shall be the responsibility of all female employees to harass any woman who takes a traditionally male job." Similarly, by exploiting respondents' proposed exemption for same-sex harassment, an employer could lawfully pursue an expressly selective anti-harassment policy, such as "Sexual harassment of men will lead to automatic dismissal; sexual harassment of women holding construction jobs will not be punished so long as the perpetrators are women". Either such policy could drive women from the jobs in question as effectively as a deliberate decision to fire them because of their gender[5].

The decision of a supervisor or fellow employee to harass a particular victim is indistinguishable from the sort of promotion or dismissal decisions whose illegality respondents concede. Respondents offer no explanation of why Title VII applies to a male supervisor who demotes or reduces the salary of a male worker, but not to that same supervisor if he harasses that identical employee. At times harassment is motivated by a specific desire to drive an employee from a particular position; that is a problem which women have historically faced when they obtain construction trade, craft

[5] The lower courts are in agreement that discriminatory harassment would constitute constructive discharge where it is so severe that a reasonable person would have been compelled to resign. *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 705 (7th Cir. 1993); *McCann v. Litton Sys., Inc.*, 986 F. 2d 946, 951 (5th Cir. 1993); *Acrey v. American Sheep Indus. Ass'n*, 981 F. 2d 1569, 1573-74 (10th Cir. 1992); *Aviles-Martinez v. Monroig*, 963 F. 2d 2, 6 (1st Cir. 1992); *Gray v. York Newspapers, Inc.*, 957 F. 2d 1070, 1079 (3d Cir. 1992); *Wilson v. S & L Acquisition Co.*, 940 F. 2d 1429, 1436 (11th Cir. 1991); *Wilson v Firestone Tire & Rubber Co.*, 932 F. 2d 510, 515 (6th Cir. 1991); *Sanchez v. City of Santa Ana*, 915 F. 2d 424, 431 (9th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991).

and other jobs traditionally held by men.[6] Title VII forbids an employer from taking an adverse action against an employee because she or he fails to conform to some stereotype regarding how women or men should act, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); in some harassment cases the victim is targeted by fellow workers precisely because he or she did not conform to such a stereotype.[7] Gender-based harassment need not be sexual in content; where a victim has been targeted because of his or her gender, even gender-neutral practices[8] will be actionable where they bring about a

[6] *Eg. Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-94, 1495 (M.D.Fla. 1991)(welder at shipyard); *Andrews v. City of Philadelphia*, 895 F. 2d 1469 (3d Cir. 1990)(police officer); *Hall v. Gus Construction Co., Inc.*, 842 F. 2d 1010 (8th Cir. 1988)(road construction worker).

[7] *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F. 3d 1191 (4th Cir.), *cert. denied* 117 S.Ct. 72 (1996); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D.Ill. 1988). The Seventh Circuit noted in *Doe v. City of Belleville, Illinois*, 119 F. 3d 563, 581 (7th Cir. 1997):

> "A woman who is harassed in the workplace . . . because her personality, her figure, her clothing, her hairstyle, or her decision not to wear jewelry or cosmetics is perceived as unacceptably 'masculine' is harassed 'because of' her sex even if the harassment itself is not explicitly sexual. . . . In the same way, a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."

[8] *Burns v. McGregor Electronic Industries, Inc.*, 955 F. 2d 559 (8th Cir. 1992)(needed work materials deliberately placed where female worker could not reach them): *Andrews v. City of Philadelphia*, 895 F. 2d 1469 (3d Cir. 1990)(plaintiff's case files stolen and destroyed; plaintiff denied routine assistance by fellow workers; anonymous harassing phone calls; plaintiff burned by lime placed on her clothes); *Lippsett v. University of*

hostile work environment. Respondents offer no explanation of why it should be relevant to such cases that the perpetrator and victim were of the same gender, when that circumstance is admittedly irrelevant to other Title VII claims.

Respondents' proposed exemption for same-group harassment would have paradoxical results in actual litigation. Suppose, for example, that a black FBI agent demonstrated that he was the target of systemic but anonymous racist harassment, including racial epithets and cartoons, race specific death threats, etc. On respondents' view, that evidence would be insufficient as a matter of law to establish a Title VII claim, unless the plaintiff could also prove that the anonymous threats and other harassment did not come from a black employee.[9]

Puerto Rico, 864 F. 2d 881 (1st Cir. 1988)(female residents told that they were to "lick the floor" if ordered to do so); *Hall v. Gus Construction Co., Inc.*, 842 F. 2d 1010 (8th Cir. 1988)(co-workers urinated in plaintiff's water bottle; refused to fix carbon monoxide in her truck); *see Doe v. City of Belleville, Illinois*, 119 F. 3d at 576 (citing cases).

A fortiori a violation is established by evidence that the harassment in question both was targeted only at persons of one gender and was facially sex-related.

[9] Racial harassment of black workers is often anonymous. *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991)(graffiti on bathroom walls; "Hi Bob KKK" painted on work shed; hanging black dummy with simulated blood; bullet fired into plaintiff's house); *Davis v. Monsanto Chemical Co.*, 858 F. 2d 345, 347 (6th Cir. 1988)(graffiti on bathroom walls; defaced poster); *Hunter v. Allis-Chalmers, Corp.*, 797 F. 2d 1217 (7th Cir. 1986)(graffiti on bathroom walls; racially derogatory notes; hangman's noose); *Snell v. Suffolk County*, 782 F. 2d 1094, 1098-99 (2d Cir. 1986)(car vandalized; racially derogatory leaflets posted on bulletin boards and walls; black worker mailed Ku Klux Klan applications); *Gilbert v. City of Little Rock*, 772 F. 2d 1390 (8th Cir. 1982)(graffiti on bathroom walls; racial cartoon on bulletin board); *Vaughn v. Pool Offshore Co.*, 683 F. 2d 922 (5th Cir. 1982)("KKK Headquarters" painted on facade

II. TITLE VII APPLIES TO SAME-SEX SEXUAL HARASSMENT

Correctly observing that a plaintiff who demonstrates the existence of *sexual* harassment need not adduce separate evidence--over and above the sexual nature of the harassment--of "deliberate decisionmaking", respondents urge that this fact somehow renders inappropriate the application of Title VII to same-sex sexual harassment. Respondents seemingly contend that sexual harassment is only unlawful because it is a form of oppression of women by heterosexual men. (R. Br. 7, 12, 14, 18). On respondent's view the libidinous desires of a male perpetrator are the very reason for, and thus ordinarily a necessary element of, a Title VII sexual harassment claim; harassment claims by men based on unwelcome sexual advances by women are cognizable only because Congress somewhat inexplicably wrote Title VII in gender-neutral terms. Nothing in the language or established construction of Title VII supports this interpretation.

Respondents' description of the evidence needed to establish a different-sex sexual harassment claim is accurate, but provides no basis for placing same-sex sexual harassment outside the scope of the statute. Sexual harassment, like other gender-specific[10] or race-specific harassment, is facially

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of company tool shed); *DeGrace v. Rumsfield*, 614 F. 2d 796, 800 (1st Cir. 1980)(anonymous threatening notes; sabotage of equipment).

[10] Female workers, for example, may be subject to gender-specific abuse or ridicule, such as being derided as intellectually inferior to men, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993)("You're a woman, what do you know"); *Lipsett v. University of Puerto Rico*, 864 F. 2d 881(1st Cir. 1988)(repeated remarks to female surgery residents that women are not competent to be surgeons); *Rabidue v. Osceola Refining Co.*, 805 F. 2d 611 (6th Cir. 1986)(supervisor insisted regarding female plaintiff's position that "we really need a man in that job"), or being

discriminatory; proof that such practices were severe or pervasive enough to create a hostile work environment is sufficient without more to establish a violation of Title VII[11].

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subjected to gender specific insults or epithets. *Harris*, 510 U.S. at 19 ("dumb ass woman"); *Wyerick v. Bayour Steel Corp.*, 887 F. 2d 1271 (5th Cir. 1989)(plaintiff repeatedly referred to on company radio as a "fucking bitch"); *EEOC v. Hacienda Hotel*, 881 F. 2d 1504 (9th Cir. 1989)(plaintiffs referred to as "whore" and "slut"); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F. 2d 900 (11th Cir. 1988)(plaintiff called "bitch" and "whore"); *Hall v. Gus Construction Co., Inc.*, 842 F. 2d 1010 (8th Cir. 1988)(female construction workers regularly referred to as "Fucking Flag girls").

The Seventh Circuit correctly observed in *Doe v. City of Belleville, Illinois*, 119 F. 3d at 578:

> "[I]t is one thing to berate a female worker as 'worthless'; although derogatory, the term on its face is gender neutral, and a hostile environment claim founded upon that type of generic harassment typically would require proof that women were belittled while men were not. But, as the Ninth Circuit has recognized, it is quite another 'to call her "a worthless broad,"' *Steiner v. Showboat Operating Co.* . . . [or] to berate her with terms like 'bitch' or 'cunt'."

[11] This case provides no occasion to decide whether an employer might be able to overcome proof of such a facially gender based practice by proving that (l) the perpetrator harassed both men and women with equal frequency, (2) the men and women were harassed in an equally severe manner, *and* (3) the harm caused by the harassment was the same for male and female victims. In the instant case respondents do not contend Lyons, Pippen and Johnson had ever harassed women in the manner alleged by petitioner, or would have done so if only they had worked at a job site at which women were employed.

This issue is evidently of no practical significance, since there appear to be no reported sexual harassment cases in which the highly unusual circumstances which would raise this issue were in fact present. *See* Brief of National Organization of Male Sexual Victimization, Inc., *et al.*, as Amicus Curiae in Support of Petitioner, pp. 21-22.

Sexual or gender-specific harassment is fundamentally different from harassment that is facially neutral in content and significance; as to such facially neutral harassment a plaintiff must prove that that action arose from a discriminatory intent in order to establish a disparate treatment claim. Where, however, the action complained of is facially discriminatory, no such demonstration is required. Thus proof that an employer had in effect a policy of forbidding workers to associate with persons of other races[12] would be sufficient by itself to establish a violation of Title VII, without regard to why the employer adopted the rule or whether the rule was enforced equally on all employees.

This Court's sexual harassment decisions treat proof that harassment was sexual in nature as sufficient to establish that the harassment was "because of [the plaintiff's] sex"[13]. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), Michelle Vinson alleged that she had been subjected to repeated, at times violent sexual abuse by her supervisor, Sidney Taylor. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), Teresa Harris proved that she had been the target of a stream of sexually offensive and misogynistic remarks by

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[12] *See Watson v. Nationwide Insurance Co.*, 823 F. 2d 360, 361-62 (9th Cir. 1987); *Parr v. Woodmen of the World Life Inc.*, 791 F. 2d 888, 892 (11th Cir. 1986); *Reiter v. Central Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D.Colo. 1985); *Gresham v. Waffle House, Inc.*, 586 F.Supp. 1442, 1445 (N.D.Ga. 1984); *cf. Loving v. Virginia*, 338 U.S. 1 (1967).

[13] A rule that an employer could defend a sexual harassment claim by offering evidence that persons of the opposite gender were also harassed would create bizarre incentives. If that were the case, "a man who makes a habit of harassing female co-workers might insulate his employer from liability . . . by occasionally harassing a male worker sexually, even if he preferred to harass women." *Doe v. City of Belleville, Illinois*, 119 F. 3d at 590.

her boss, Charles Hardy. Neither opinion attached any significance to why Taylor or Hardy had chosen to sexually harass Vinson and Hardy, or to how they might have treated others. To the contrary, *Meritor* held that Vinson's allegations of "not only pervasive harassment but also criminal conduct of the most serious nature" were by themselves "plainly *sufficient* to state a claim for 'hostile environment' sexual harassment." 477 U.S. at 67 (emphasis added); see *id.* at 74 (Marshall, J., concurring)("workplace sexual harassment is illegal, and violates Title VII"); *Harris v. Forklift Systems Inc.*, 510 U.S. at 24 (Scalia, J., concurring)("*Meritor* . . . held that Title VII prohibits sexual harassment that takes the form of a hostile work environment. . . . [S]exual harassment is actionable if it is 'sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."'").

Meritor quoted and expressly approved the definition of unlawful sexual harassment contained in the EEOC Guidelines, 29 C.F.R. §1604.11(a)[14]. 477 U.S. 65-66. Those Guidelines, like *Meritor* itself, contain no requirement that the victim of sexual harassment adduce evidence regarding the sex or sexual orientation of her or his harasser or the manner in which the harasser treated others. If Taylor indeed harassed Ms. Vinson in the manner alleged in *Meritor*,

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[14] "Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."(Footnote omitted).

it would be irrelevant whether he did so because her found her sexually attractive, because he held some personal grudge against her, because he wished to express some generalized hatred of (or affection for) women, or because he was venting some displaced anger that arose out of circumstances entirely unrelated to Vinson, sexuality, or gender.[15]

The very fact that sexual harassment *is* sexual in nature is sufficient to meet the plaintiff's burden. It is a matter of common sense, confirmed by long judicial experience and by the decisions of this Court, that where abuse is sexual in nature, the victim's sex was a substantial factor[16], often the only factor, in the perpetrator's action directing that abuse at the victim, or in the perpetrator's selection of sexual abuse as the method[17] of harassment. Although some early decisions suggested simply that a victim's sex could be presumed to be a factor in a sexual harassment case[18], the lower courts--like this Court in *Meritor* and *Harris*--have long regarded the sexual nature of such harassment as dispositive.[19]

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[15] E.g. *Winsor v. Hinckley Dodge, Inc.*, 79 F. 3d 996, 998 (10th Cir. 1996)(harassment of plaintiff began with dispute over apportionment of sales commissions).

[16] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-50 (1989).

[17] The Seventh Circuit has correctly recognized that discrimination can lie "not [only] in the selection of victims (which might be random) but[also] in the decision to perpetrate the harassment through words and conduct charged with unmistakable racial, religious, and ethnic overtones hostile to each victim because of his particular race, religion or ethnicity." *Doe v. City of Belleville, Illinois*, 119 F. 3d at 580.

[18] *Barnes v. Costle*, 561 F. 2d 983, 989 n. 49, 990 (D.C.Cir. 1977).

[19] *E.g. Nichols v. Frank*, 42 F. 3d 503, 511 (9th Cir. 1994); *Andrews v. City of Philadelphia*, 895 F. 2d 1469, 1482 n. 3(3d Cir. 1990); *Henson v. City of Dundee*, 682 F. 2d 897, 904 (11th Cir. 1982); *Cline v.*

Nothing about same-sex harassment would warrant a method of analysis different than was utilized in *Meritor*, *Harris*, and their progeny. Most of the reported same-sex sexual harassment cases present factual circumstances indistinguishable--except for the fact that the perpetrator and victim were of the same gender--from different-sex harassment cases. Same-sex claims most often involve either unwelcome sexual advances from perpetrators seeking an intimate sexual relationship with the victim, or quid pro quo demands from supervisors for such a relationship[20]. In many of these cases, as here, the harassment is so severe that the victims are forced to resign, a consequence which interferes far more than a demotion or pay reduction with their employment opportunities with the employer involved. Because section 703(a) refers only to the sex of the victim, and not to the sex of the harasser, there is no basis for treating such cases differently from different-sex harassment cases. "[I]f [petitioner] were a woman, there would be no agonizing over whether the harassment . . . described could be understood as sex discrimination. The happenstance that he is instead a male should not make for an entirely different analysis, particularly for purposes of a statute that forbids sex

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General Elec. Credit Auto Lease, Inc., 784 F. Supp. 650, 654 (N.D.Ill. 1990).

[20] The Title VII prohibition against different-sex sexual harassment cases is not, of course, limited to such situations. *Harris v. Forklift Systems* involved neither sexual advances nor quid pro quo demands. Nor is there any requirement in different-sex harassment cases that the perpetrator be a heterosexual. Any requirement in same-sex harassment cases that the plaintiff prove that the harasser was a homosexual, in orientation or past practice, would lead to horrendous problems of discovery and proof, and to extensive proceedings on matters that are quite removed from the purposes of Title VII, to protect the *victim* against discrimination on account of *his or her* gender.

discrimination." *Doe v. City of Belleville, Illinois*, 119 F. 3d 563, 57[illegible] (7th Cir. 1997).

Respondents do not and could not deny that the incidents alleged in the complaint in the instant case were sexual in nature. They do not assert, for example, that Lyons had some non-sexual reason for repeatedly touching petitioner with his penis rather than with some other part of Lyons' body, that Lyons rubbed a bar of soap between petitioner's buttocks to help him wash that part of his body, or that Lyons' repeated statements that he was going to "fuck [petitioner] in [his] behind" was some sort of a metaphor. Under Louisiana law several of these alleged actions would constitute sexual battery. LSA-R.S. §43.1 (1997.)[21]

A holding that the sexual harassment forbidden by Title VII is not limited to heterosexual advances or quid pro quo demands would not convert Title VII into a prohibition against discrimination on the basis of sexual orientation. The discrimination complained of in this case has whatever to do with petitioner's sexual orientation. Petitioner could establish the existence of an unlawful hostile work environment, for example, by showing that the harassment of a sexual nature occurred, or that respondent Sundowner would have accorded

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[21] "A. Sexual battery is the intentional engaging in any of the following acts with another person . . . where the offender acts without the consent of the victim . . . :

(1) The touching of the anus . . . of the victim by the offender using any instrumentality or any part of the body of the offender; or

(2) The touching of the . . . genital of the offender by the victim using any instrumentality or any part of the body of the victim."

The punishment for this offense under Louisiana law is a term of imprisonment of ten years "without benefit or parole, probation, or suspension of sentence."

a greater degree of protection to a woman complaining about such harassment. Neither such showing requires proof regarding the sexual orientation of either petitioner, the alleged harassers, or the supervisors responsible for deciding how to respond to petitioner's complaints.

III. A TITLE VII SEX DISCRIMINATION PLAINTIFF IS NOT REQUIRED TO PROVE THAT PERSONS OF THE OPPOSITE SEX WERE SIMILARLY SITUATED AND TREATED DIFFERENTLY

Respondents argue, in the alternative, that in the instant case it will be impossible to prove unlawful discrimination because only men worked on the platform on which petitioner was employed. This contention does not appear to be related to the fact that the harassment in this case involved persons of the same sex, but is apparently proffered as a general principle applicable to all Title VII cases.

Insofar as petitioner is able to prove at trial that harassment of a sexual nature occurred and was sufficiently severe or pervasive to create a hostile work environment, he, like the plaintiffs in *Meritor* and *Harris*, will have met his burden. Were this Court to hold that sexual harassment as a matter of law can never be proven where all the perpetrator's potential victims were members of the same protected group, such a holding would create the equivalent of free-fire zones, in which harassment on the basis of gender, race or national origin would--for want of a similar comparator--be permissible under Title VII. If, for example, the male owner of the Forklift Systems had had only female employees, on respondents' view he could have sexually harassed all of them with impunity, since that workplace--like the offshore platform in this case--would have had no employees of the opposite gender with which that treatment could be compared. Adoption of respondents' proposed rule would also create a

variety of perverse incentives. In the instant case, for example, respondent Sundowner would in its own view face serious potential financial liability for actions of the sort which occurred in this case if, but only if, it were to hire a woman to work on the platform in question, since an assessment of comparable treatment on the platform itself would then be possible. Indeed, once a discrimination charge such as that in the instant case had been filed with the EEOC, an employer would be under great pressure not to hire any woman to work at the job site in question until the claim had been finally resolved on the merits.

The complaint in this action also alleged that the individual respondents verbally abused petitioner in non-sexual, gender-neutral terms. (App. 76). To establish that such gender-neutral action was discriminatory, petitioner would have to prove that his gender was a factor in the abuse. But the fact that no women worked on the platform in question would not be fatal to such a contention. Respondents argument confuses one method of proving an illicit intent with the actual elements of such a discrimination claim.

Evidence of dissimilar treatment of similarly situated women is but one manner in which a plaintiff might demonstrate the existence of a discriminatory intent. Even in the absence on the platform of women with whom petitioner's treatment might be compared, other types of probative evidence might well be adduced that would persuade a reasonable trier of fact that gender was a factor in the harassers' actions. Statements made by the harassers regarding why they were hostile to petitioner (or perhaps others), such as objections that petitioner failed to conform to some sexual stereotype, would obviously be relevant. Evidence might be adduced regarding whether the perpetrators, at other periods in their working lives when they

worked at facilities with female employees, and had or had not abused them in similar ways. At this juncture in the litigation the alleged harassers have not even proffered any gender-neutral explanation as to why they targeted petitioner for abuse; their sworn testimony may conceivably support petitioner's contentions. Even if they ultimately offer some gender-neutral explanation for their conduct, a rejection of that account by the trier of fact, particularly "accompanied by a suspicion of mendacity", could be sufficient to justify a finding of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

Respondents argue that a gender-based intent can only be proven, and thus that gender-based discrimination is as a practical matter is only forbidden by Title VII, when there is a comparator of the opposite gender who, despite being in identical or essentially similar circumstances, has been treated more favorably. This Court expressly rejected such an interpretation of Title VII in *County of Washington v. Gunther*, 452 U.S. 161 (1981). The defendant in that case contended that Title VII did not forbid an employer to discriminatorily underpay a female worker "unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay." 452 U.S. at 178. This Court held that Title VII did not permit such discriminatory schemes.

> [I]f an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. . . . [A] female auditor thus might have a cause of action while a female secretary might not. . . . [This proposed] reading is thus flatly inconsistent with our past interpretations of Title VII

> as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of . . . sex . . . ."

452 U.S. at 179-80.

On respondents' view, an employer with only women workers doing a particular type of work could avowedly pay those employees low wages because of their gender, since there would be no similarly situated male workers with whom they could be compared; that is the very practice expressly declared unlawful by *Gunther*. If the only employee who held a particular job, or who had committed a particular transgression, was a woman, under respondents' approach an employer might be able with impunity to fire her on account of her gender, since there would be no substantially identical male worker with whom her treatment could be compared. The lower courts have properly refused to read such loopholes into Title VII. *Leffel v. Valley Financial Services*, 1997 U.S.App. LEXIS 11359, *18-*19 (6th Cir. 1997); *Brown v. Parker-Hannifin Corp.*, 746 F. 2d 1407, 1410 n. 3 (10th Cir. 1984).

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

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